

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
JONESBORO DIVISION

TRISTATE ADVANCED SURGERY CENTER, LLC,  
GLENN A. CROSBY II, M.D., F.A.C.S., and MICHAEL HOOD, M.D.,  
Plaintiffs,

v.

No. 3:14CV00143 JM

March 29, 2016  
Little Rock, Arkansas  
10:29 a.m.

HEALTH CHOICE, LLC, and  
CIGNA HEALTHCARE OF TENNESSEE, INC.,  
Defendants.

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CONNECTICUT GENERAL LIFE INSURANCE COMPANY,  
CIGNA HEALTH AND LIFE INSURANCE COMPANY, and  
CIGNA HEALTHCARE OF TENNESSEE, INC.,  
Counterclaim-Plaintiffs,

v.

SURGICAL CENTER DEVELOPMENT, INC. d/b/a SURGCENTER  
DEVELOPMENT, and TRISTATE ADVANCED SURGERY CENTER, LLC,  
Counterclaim-Defendants.

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TRISTATE ADVANCED SURGERY CENTER, LLC,  
Counter-Counterclaim-Plaintiff,  
and

GLENN A. CROSBY, II, M.D., and MICHAEL HOOD, M.D.,  
Third-Party Plaintiffs,

v.

CIGNA HEALTHCARE OF TENNESSEE, INC., CIGNA HEALTH AND LIFE  
INSURANCE COMPANY, and CONNECTICUT GENERAL LIFE INSURANCE  
COMPANY,

Counter-Counterclaim-Defendants,

and

HEALTH CHOICE, LLC,  
Third-Party Defendants.

TRANSCRIPT OF MOTION HEARING,  
BEFORE THE HONORABLE JAMES M. MOODY, JR.  
UNITED STATES DISTRICT JUDGE

Karen Baker, RMR, CRR, CCR  
United States Court Reporter

## 1 APPEARANCES:

## 2 On Behalf of the Plaintiffs:

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19 Proceedings reported by machine stenography and displayed  
20 in realtime; transcript prepared utilizing computer-aided  
transcription.

## P R O C E E D I N G S

(Proceedings commencing in open court at 10:29 AM.)

THE COURT: We are on the record in 3:14CV143, Tristate Advanced Surgery versus Health Choice and Cigna, et al. at this point. Some are still here and some are not. Here to discuss the motion for I guess it's entitled miscellaneous discovery relief, but it has to do with what I'll generically call the Colorado discovery. Is that a fair --

MR. HALIJAN: Yes, Your Honor.

THE COURT: -- summation of the material that we're talking about? I have read the motions, briefs, replies, and responses to this particular issue as well as some other stuff we're working on, some pending things to put it in context. Who is going to talk to me about the motion on behalf of the plaintiffs I guess in this?

MR. HALIJAN: That would be me, Your Honor. Doug Halijan from Burch, Porter & Johnson in Memphis. With me is my partner, Molly Glover.

THE COURT: Hello.

MS. GLOVER: Hello.

THE COURT: You've got the floor.

MR. HALIJAN: Thank you, Your Honor. I understand certainly that the Court has read the written materials, but I'm going to hit a few high important parts before drilling down a little bit deeper into some of the particular issues

1 that seem to be most contentious about this issue, why are we  
2 here.

3 Your Honor, I respectfully submit that the relief we're  
4 seeking is very limited. This is as the Court knows one of  
5 several cases pending around the country between Cigna parties  
6 on one side and SurgCenter and SurgCenter affiliated surgery  
7 centers like Tristate on the other. Tristate is the only  
8 ambulatory surgical center in Crittenden County, one of the  
9 very few such facilities in the eastern part of the state.  
10 Claims and counterclaims in these cases are similar. The  
11 plaintiffs in this case allege that the defendants have  
12 conspired to drive business away from Tristate, that they're  
13 tortuously interfering with patient and business relationships,  
14 and that they're violating various provisions of ERISA. Cigna,  
15 on the other hand, alleges that my clients SurgCenter and  
16 Tristate have engaged in what they call a fraudulent billing  
17 scheme or fraudulent practices that are intended to evade  
18 restrictions that the Cigna entities place on out of network  
19 providers and patients covered by Cigna insurance plans and  
20 that this scheme is common to SurgCenter and SurgCenter  
21 affiliated surgery centers around the country.

22 And one of these cases, the Colorado case, discovery,  
23 fact discovery, has concluded. So in that case, nothing  
24 unusual about this, in that Colorado case, the parties, Cigna  
25 on the one hand, the SurgCenter parties on the other,

1 designated numerous depositions, deposition exhibits, discovery  
2 documents, and ESI and some pleadings as either confidential or  
3 highly confidential under the protective order in place there.  
4 That protective order, as most do, as the one in this case  
5 does, prohibits disclosure of documents designated confidential  
6 or highly confidential to any attorney who is not, quote,  
7 counsel of record in that particular case.

8       Importantly, and a point we made in our briefs, but I  
9 think is important to emphasize here, SurgCenter's counsel in  
10 both the Colorado and the Maryland cases already have access to  
11 all of this, it's no mystery to them as to what it contains.  
12 Moreover, documents, deposition testimony, deposition exhibits  
13 designated confidential can be shown to the client itself. So  
14 my client has access to all of this. The defendants' lawyers,  
15 the Cigna lawyers, Mr. Haske1 who will speak in a moment, he  
16 has access to all of this by virtue of the fact that his firm  
17 represents the Cigna entities in all of these cases. But  
18 because of the way they're designated, the one group of lawyers  
19 pretty much anywhere that has any relation to this dispute,  
20 whether here in this Arkansas court or around the country, the  
21 one group of lawyers that can't look at it are Tristate and  
22 SurgCenter's counsel here. That's me and Ms. Glover.  
23 Everybody else can see it.

24       So if the Cigna parties have their way, its own trial  
25 counsel in this case will have had access to all of this

1 discovery, these depositions, these deposition exhibits,  
2 anything that was labeled confidential or highly confidential,  
3 while SurgCenter's trial counsel in the Arkansas case does not.  
4 We tried to work this out. We've certainly agreed orally, we  
5 have agreed as we have represented to the Court in our briefs  
6 that we will sign the protective order, the acknowledgment  
7 form, again, a very customary way of handling materials like  
8 this. We will sign the Colorado acknowledgment form under that  
9 protective order. But Cigna has refused to allow us access.  
10 So that is what we are here today for. That's what's brought  
11 us here.

12 We are seeking a very limited order that would compel  
13 Cigna to allow or consent to SurgCenter's Arkansas trial  
14 counsel, that is SurgCenter's Colorado trial counsel rather, to  
15 share with Arkansas trial counsel copies of these documents,  
16 deposition testimony, deposition exhibits, etc. This can be  
17 done in one of two ways. It can be done by an order of this  
18 court, we respectfully submit under Rule 37, the rule we moved  
19 under, or it can be done by modifying the protective order that  
20 is already in place here as the Maryland district court did in  
21 Maryland without touching the Colorado protective order. And  
22 I'll describe that in a little bit more detail in a moment.

23 So why do we want this, why is this important?  
24 Principally it's because my clients ought to have the same  
25 benefit and its lawyers ought to have the same benefit of

1 seeing the information, the record, the discovery record, the  
2 testimony taken in this other case and coordinating its claims  
3 and its defenses to the same degree that the Cigna parties do.  
4 Right now, only the Cigna lawyers have the benefit of having  
5 reviewed this record, this discovery record that's now  
6 essentially complete in Colorado while we do not as we prepare  
7 for depositions here.

8 THE COURT: Let me interrupt you real quick, because  
9 I understand what you're asking for in a general sense, but  
10 what are you asking for and what do you hope to do with it?  
11 Because right now, as I understand it, you want all the  
12 discovery in the Colorado case, not any particular depositions  
13 of witnesses that have been designated in I call it my case,  
14 the Arkansas case or whatever. And then if you have all this,  
15 what do you hope to do with it? Because it's difficult for me  
16 to understand in the abstract and maybe difficult for you to  
17 comment on because you haven't seen it, but how is any of this  
18 relevant unless it pertains to something that your previous  
19 counsel in this case designated as having something to do with  
20 the price of tea in China in this case? And I can understand  
21 if there were three witnesses or six. I think there were three  
22 mentioned in the pleadings that said these are the people who  
23 testified out in Colorado who were likely to testify in  
24 Arkansas, but beyond that, why would depositions of people who  
25 aren't even going to be testifying in this case be relevant?

1 MR. HALIJAN: Let me answer that in a couple of  
2 ways, Your Honor. And Your Honor touched on the first part of  
3 the answer. I haven't been allowed to review it. I can't --  
4 and that's the reason that we framed the request so narrowly.  
5 Right now, the request is simply that we be allowed to have the  
6 same access to this record that Cigna's counsel does and that  
7 SurgCenter's counsel does in these other cases, and indeed  
8 still would had SurgCenter and Tristate not made the decision  
9 to change representation so that more local lawyers are lead  
10 trial counsel in these various cases.

11 So, Your Honor, I can't represent to the Court what I  
12 would do with something that I haven't even been allowed to  
13 see. We have not sought an order that would permit us to use  
14 anything and everything that might come out of this discovery  
15 record in Colorado. All we're asking for is just the right to  
16 read it. All we want is the right to read it right now. So in  
17 speaking a little bit more broadly to the Court's question, we  
18 think it's just a matter of fairness is the simplest way to say  
19 it. We ought to be allowed to see how the depositions,  
20 deposition testimony was developed as to all of the witnesses  
21 in that case. We're willing to abide by the protective order  
22 and indeed but for the change of counsel, counsel in Arkansas  
23 would have it, would be allowed, would have been allowed to see  
24 it. It's already in their possession.

25 So we're not -- we don't have any kind of particular



1 motive as to what we're going to do when we read one deposition  
2 versus another. And Your Honor is correct, there are at least  
3 three overlapping witnesses, although again, we submit we ought  
4 to have the right to access all of them, but I can't answer  
5 what we'll do with it if I'm not even allowed to look at it.

6 THE COURT: Okay.

7 MR. HALIJAN: So last thing I'll say on that  
8 subject, the present situation just places counsel on a vastly  
9 different footing, again, given that this situation we're in  
10 results only from the fact that our clients changed lawyers  
11 from the law firm that represents SurgCenter and the SurgCenter  
12 affiliated centers out in Colorado. We don't think the  
13 discovery rules -- and we've cited a number of cases which I'm  
14 sure the Court has looked at, we don't think the discovery  
15 rules countenance that kind of unfair, and we respectfully  
16 submit, illogical outcome again where we can't even see any of  
17 this stuff.

18 Switching gears a bit, there's no prejudice here. Cigna  
19 hasn't offered in its opposition any plausible argument as to  
20 why it is even remotely prejudiced or subjected to any kind of  
21 burden whatsoever by our request that we simply be allowed to  
22 have access to the same record involving some of the identical  
23 parties that Cigna's trial counsel in Arkansas does. I think  
24 it's a fair question not addressed in the opposition as, you  
25 know, what is it in this record that they don't want us to see.

1 And so why are we here today fighting over something that,  
2 again, is already in the possession of SurgCenter's counsel,  
3 just not SurgCenter's counsel in this case. The briefing  
4 really to the contrary demonstrates a complete lack of  
5 prejudice.

6 We're not asking that Cigna do anything. They won't have  
7 to lift a finger, they won't have to copy a single piece of  
8 paper, they won't have to duplicate a single electronic file.  
9 All that will have to be done is us be given permission to  
10 access all of these records which SurgCenter's counsel and  
11 indeed my client itself in many instances already has. These  
12 cases are similar, again, with some of the same parties and  
13 some of the same allegations. An argument that Cigna does make  
14 in its opposition is that while the, quote, legal claims in  
15 Colorado and Arkansas are broadly similar, they are so, quote,  
16 factually different I think is what the brief says that my  
17 client's Arkansas trial counsel ought to be deprived of the  
18 opportunity to even read and judge that for themselves.

19 That's not a tenable position again for the reasons we  
20 covered in our brief. The counterclaims in particular that  
21 Cigna is pursuing against my clients are virtually identical to  
22 those it is pursuing against SurgCenter and the SurgCenter  
23 affiliated centers out in Colorado. These counterclaims all  
24 relate to Cigna's disagreement with the billing policies and  
25 practices employed at the particular SurgCenter surgery centers

1 at issue. And the whole premise of Cigna's counterclaims  
2 against us is that these billing policies and practices were  
3 developed and part of a common SurgCenter business model and  
4 that, again, quoting, all aspects of the pricing schemes used  
5 by each SurgCenter ASC were designed and implemented at its  
6 direction. Cigna has acknowledged in prior pleadings before  
7 this court the similarity and relatedness of the cases when it  
8 was in its interest to do so.

9 Cigna told this court that the Colorado judge's decisions  
10 involved, quote, similar claims brought by Cigna against fee  
11 forgiving ambulatory surgical centers with which SurgCenter is  
12 affiliated. We cited to the testimony taken about six weeks  
13 ago in another case, a deposition that was not marked  
14 confidential, let me assure the Court, in another case by a man  
15 named Thomas Hixson, a Cigna corporate representative who was  
16 on the will call list in Colorado and who was listed as a  
17 person with knowledge in our case here in Arkansas.

18 THE COURT: He's one of the three I guess that were  
19 mentioned, a Michael Battistoni, B-a-t-t-i-s-t-o-n-i, and Mary  
20 Cisar, C-i-s-a-r, and Tom Hixson. You said you've deposed  
21 Hixson?

22 MR. HALIJAN: We have not deposed Hixson in this  
23 case yet. He was deposed in another dispute between these same  
24 parties, and it's another case. It's a case styled Monocacy  
25 Surgery Center, LLC versus Cigna Health and Life Insurance.

1 That's pending in Colorado. But we've seen that deposition  
2 because it's not marked, hasn't been designated confidential by  
3 any party. He testified, could not have been clearer that  
4 Cigna's special investigations unit conducted an investigation  
5 of all the SurgCenter affiliated centers or the ones they  
6 believed to be affiliated with SurgCenter, that it was  
7 designated as a, quote, special project and that all claims  
8 from SurgCenter affiliated surgery centers were processed  
9 pursuant to the same protocols. So while there are clearly  
10 different surgery centers involved, the one I represent is in  
11 Marion, these others are in Colorado, Maryland or wherever they  
12 may be, Cigna by its own admission by the testimony of its own  
13 corporate rep is saying that they were treated the same.

14 Now, the jury here, the jury in Colorado will have to  
15 make their own decisions about whether the plaintiffs are right  
16 or the defendants are right and prove the respective claims or  
17 counterclaims, but honestly, I cannot see for the life of me  
18 how Cigna can argue that the cases are so different that I  
19 ought not to be even allowed to look at the discovery record  
20 adduced in Colorado when their counsel has it. Again,  
21 returning to the fairness argument. Unless the Cigna lawyers,  
22 unless Mr. Haskell has a remarkable ability to compartmentalize  
23 information in his head, he knows what record was adduced in  
24 Colorado and how it came to be, what questions were asked, how  
25 they were asked, what questions weren't asked, what exhibits

1 were offered, what exhibits were not offered. We're just  
2 asking for the same opportunity here.

3 Finally, let me speak a second to this. There was some  
4 suggestion in Cigna's opposition that we're asking this court  
5 to rewrite another court's order. That is absolutely not what  
6 we're doing and that is absolutely not what would be required  
7 to grant us the relief we seek. Protective orders in place in  
8 these other cases and particularly in the Maryland case between  
9 some of these same parties already provide for more than I'm  
10 asking for here this morning, and that agreement didn't require  
11 any modification of the Colorado order at all.

12 THE COURT: Wasn't the Maryland order agreed to?  
13 Didn't the parties or the lawyers in the Maryland court agree  
14 to the modification of the protective order out of Colorado?

15 MR. HALIJAN: Yeah, absolutely, they agreed to --  
16 the point I'm trying to make is the suggestion that we're  
17 somehow asking the Court to rewrite another court's order kind  
18 of misses the point of what we're arguing about here. Yeah,  
19 Cigna won't agree here when it agreed in Maryland. We don't  
20 think that that makes any sense and we don't think it's fair  
21 for Cigna to say, well, when we agreed to it, we'll let the  
22 counsel on the other side see it, use it, whatever. Again,  
23 that agreement related to use, not just access. I'm only  
24 asking about access. But they did it and so not only does the  
25 case, the order in Maryland permit access, it permits use both

1 ways. It didn't require any modification of the order and,  
2 again, we believe the Court can do that here.

3 It's a very simple one-paragraph modification of the  
4 protective order that is already in place. There's also a  
5 suggestion in the opposition that there could be third party  
6 rights or third party discovery involved here. Again, the  
7 parties in Maryland agreed, stipulated to the sharing of this  
8 information, the use of it running both ways in Maryland  
9 without speaking to any third party rights, so we're concerned  
10 that that's just kind of an attempt to change the subject more  
11 than any real concern since we're willing to sign on to the  
12 protective order.

13 THE COURT: Was the agreement to use the discovery  
14 in Maryland the entire Colorado record or just portions of it?

15 MR. HALIJAN: The way the order reads, the way the  
16 agreement and order reads, it's both ways, it's Colorado  
17 discovery record can be used in Maryland, Maryland discovery  
18 record can be used. There's no attempt on the record in either  
19 the discovery agreement or the Maryland protective order that  
20 carves out you can see this, but you can't see this, you can  
21 use this, but you can't use that. So, again, if the Maryland  
22 court could permit such access, albeit with the agreement of  
23 the parties there, we think the Court can do that here, can  
24 order that here without revising the Colorado protective order.  
25 And, again, I think the Court is clear on this, but let me be

1 absolutely clear.

2 We're willing to sign on to the confidentiality order, to  
3 the protective order. Counsel out there has it, our client has  
4 some of it to the extent it's marked confidential as opposed to  
5 highly confidential. We're willing to be signatories or to  
6 sign the acknowledgment form under that protective order so  
7 that we will be charged under threat of contempt of court if we  
8 misuse or disclose any of that record beyond what is permitted  
9 by that order itself. So we respectfully submit that to ensure  
10 that the parties in the case proceed with depositions, because  
11 that's kind of the fork in the road we're at right now, and on  
12 to trial on equal footing, the Court should allow us access to  
13 this record even over Cigna's objections. And I'll close there  
14 unless the Court has additional questions for me now.

15 THE COURT: It's likely I will later, but not right  
16 now.

17 MR. HALIJAN: Thank you.

18 MR. HASKEL: Your Honor, Warren Haskell, Kirkland &  
19 Ellis. With me here today is John Tull of Quattlebaum, Grooms  
20 and Tull. If I may proceed.

21 THE COURT: You may.

22 MR. HASKEL: Thank you, Your Honor. We just heard  
23 from plaintiffs and one of the things that came out clearer  
24 from what I was hearing from them is they think that this  
25 question is innocuous, it's a simple limited request, and I

1 want to highlight two things for Your Honor that show it's  
2 really not. This request would impose undue burden and  
3 prejudice to Cigna with minimal, if any, benefit to the  
4 plaintiffs. And second, this request is not limited. It's  
5 procedurally improper and that's not just because it's untimely  
6 and we raised that in our briefs, but also because of how it  
7 would affect Cigna's obligations under a protective order  
8 entered by another court with regard to third party documents.  
9 So I'll highlight those two issues.

10 So turning to the burden and prejudice. I just want to  
11 step back and talk about how this came to be. Cigna has made  
12 every effort in this suit to avoid unnecessary discovery  
13 disputes before this court. When the plaintiffs retained new  
14 counsel in October of 2015, Cigna was well under way with its  
15 production. There's something in plaintiffs' reply that  
16 suggests that we hadn't produced a single document. We had  
17 produced almost 10,000 pages of documents before they made an  
18 appearance in this case, and we were getting ready to produce  
19 more when we heard from plaintiffs' new counsel that they  
20 wanted to basically reopen discovery. We worked with  
21 plaintiffs to come to compromise to avoid motion practice, we  
22 agreed to an extension that we didn't think was necessary, we  
23 agreed to supplemental discovery requests, a lot of  
24 supplemental discovery requests, we agreed to supplemental  
25 search terms.



1           So we had already, with their old counsel, come up with a  
2 set of search terms, they said, well, we want more, we agreed  
3 to that and that led to us having to review tens of thousands  
4 of additional documents. So it's against this backdrop that  
5 Cigna wouldn't agree to plaintiffs' discovery requests here.  
6 And let me be clear, the issue here isn't Cigna's desire to  
7 withhold relevant documents from plaintiffs that may have been  
8 produced in Colorado. To the extent that they're relevant  
9 documents, there are discovery requests that would have covered  
10 it here. What plaintiffs argue, they say Cigna won't be  
11 burdened because Cigna won't have to re-review any materials  
12 even if they aren't relevant. That's not true. Plaintiffs'  
13 request is going to greatly expand the volume of materials and  
14 even if they're irrelevant, that the parties will be  
15 responsible for in this case even though this case is vastly  
16 smaller than the Colorado action.

17           Let me give you some just numbers of what the Colorado  
18 case involved. In Colorado, Cigna alone produced 190,000 pages  
19 of documents. We defended, there are ten Cigna witnesses that  
20 were deposed leading to nearly 1500 pages of testimony. That's  
21 just Cigna. There were third parties, there were SurgCenter,  
22 there were six ASCs, four from Colorado, two from Maryland, I  
23 believe they produced in the hundreds of thousands of  
24 documents. Now, the Colorado action involved six, as I said,  
25 six ASCs, two hospital systems, numerous other insurers. Here

1 we're dealing with Cigna, one ASC, two of their physician  
2 investors, and SurgCenter.

3 If plaintiffs are given access to the Colorado discovery  
4 in this case, both sides are going to have to consider it when  
5 preparing witnesses, responding to motions for summary  
6 judgment, preparing for trial, it's just going to greatly  
7 expand the paper and amount volume of material discovery that  
8 everyone's going to have to consider before doing anything in  
9 this case. It's a significant amount of work for a case  
10 involving one ASC. And ASC, I'm sorry, it's ambulatory  
11 surgical center.

12 Now, there's another area of prejudice and it involves  
13 the documents that are relevant in this case and they're very  
14 sensitive to Cigna. They involve rate negotiations with the  
15 Colorado and Maryland ASCs, not just directly with those ASCs  
16 but also the internal deliberations of Cigna. It involves  
17 internal market analysis of the mountain west region,  
18 mid-Atlantic region. It involves, and this is extremely a  
19 sensitive area, patient data for Cigna members, and not just  
20 Cigna members but other insurers. Plaintiffs simply have no  
21 need for that. Now, we're not --

22 THE COURT: Let me slow you down because I'm reading  
23 back to make sure I understood what you said. You said there  
24 are documents that are relevant in this case that are sensitive  
25 to Maryland, I mean sensitive to Cigna, and then you talked

1 about the Maryland and Colorado rate situation.

2 MR. HASKEL: I misspoke. I meant there are  
3 documents in the Colorado action that are sensitive and  
4 specific to Colorado that are sensitive to Cigna.

5 THE COURT: I understood that part. But you said  
6 that they were relevant to this case.

7 MR. HASKEL: What I was saying is to the extent that  
8 there are relevant documents, we've produced them in this case,  
9 but there are a subset of documents that are irrelevant in this  
10 case, but are also very sensitive to Cigna. So let's compare  
11 that again to the burden to what -- compare the burden to what  
12 plaintiffs will get from this. Now, plaintiffs already have  
13 access to all the materials or, could, that SurgCenter produced  
14 in that action just like I don't have to be -- Cigna could give  
15 me access to any production that they have, they're their  
16 documents. So if SurgCenter wants to give them their own  
17 documents, they can.

18 And as Your Honor in questioning noted, I haven't heard  
19 anything that plaintiffs say that they need from the Colorado  
20 action that they haven't asked for or gotten here, and we've  
21 said if there are issues with our production, let us know. We  
22 haven't heard any. Plaintiffs had two opportunities to request  
23 relevant documents or two different deadlines to request  
24 relevant documents from Cigna. They posit, plaintiffs, that  
25 they would have to look at all of the productions in that case

1 to understand what's maybe relevant, what's not. That's not  
2 typically how discovery works. If you think something's  
3 relevant, you ask for it in discovery requests. There's  
4 nothing preventing them from speaking to Whatley Kallas and  
5 saying what's relevant in these lawsuits, they just can't go  
6 into confidential or highly confidential, the substance of  
7 those documents.

8 But they could certainly ask for anything relevant and if  
9 it's relevant, we're going to produce it and we agreed to  
10 produce it. We agreed to open up our search terms so they  
11 would get those documents. So to suggest that there's  
12 something here that they might need in the other case but not  
13 here is just maybe they missed something in discovery requests.  
14 We haven't heard it yet though. They haven't raised a single  
15 category of documents that they think was produced in Colorado  
16 that they don't have here. And that's what makes this motion  
17 so off base.

18 In the cases that plaintiffs rely on in their motions,  
19 the parties ask for discovery in another litigation to avoid  
20 duplicative discovery. They did it before they engaged in  
21 discovery in the related case. Here, plaintiffs made their  
22 requests for discovery, for this access to Colorado discovery  
23 well after discovery was under way here, well after they were  
24 retained, new counsel was retained. After we had seven meet  
25 and confers before plaintiffs' new counsel brought it up and we

1 had already agreed to search terms, already started doing  
2 supplemental review, already agreed to supplemental discovery  
3 requests that we may not have had to do if they would have just  
4 raised that issue sooner.

5 THE COURT: Mr. Haskel, were the Maryland lawyers  
6 the same lawyers that they had in Colorado, that SurgCenter had  
7 in Colorado?

8 MR. HASKEL: The lawyers in the Maryland action are  
9 not the same lawyers as the ones they have in Colorado.

10 THE COURT: And in this particular case, the  
11 Colorado lawyers were the same in Arkansas and so it wasn't  
12 until they got off the case that it became an access issue. It  
13 may have been a use issue, but what need was there to negotiate  
14 this kind of agreement between Colorado, all of Colorado  
15 counsel that now have moved to Arkansas?

16 MR. HASKEL: That's the importance of the timeline  
17 here. New counsel was retained in October of 2015. So I agree  
18 with you, at that point, there was no reason necessarily if all  
19 that was the purpose of this is just institutional knowledge at  
20 that point, there was no need to request it. But they didn't  
21 make this request until the end of January after we had  
22 extensive negotiations about search terms, and broadening  
23 discovery that if they had asked right at the outset, we could  
24 have had a conversation, well, does it make sense, does a  
25 portion of that discovery make sense, maybe give you deposition

1 transcripts and the motion for summary judgment. There were  
2 ways that we could have actually made this to avoid duplicative  
3 discovery, which is all the cases that they cite, that's the  
4 purpose of giving them access. This won't avoid duplicative  
5 discovery.

6 And if that was truly their concern, like I said, they  
7 should have raised it. They knew this was an issue when they  
8 came on, but yet they waited three months about to raise the  
9 issue. So that's why this is not -- it's obviously they were  
10 not on, and there may not have been a reason, although the  
11 protective orders are what they are, we can't use those  
12 materials, so if that's ultimately the goal, then that was  
13 always going to be an issue. Our solution was this is a  
14 smaller case, the issues may be similar, but we'll talk about  
15 the investigation was different here. The plaintiffs have  
16 suggested that this was a part of a SurgCenter-wide  
17 investigation.

18 Well, in the Colorado case, we collected all of our  
19 documents by June 2014 when plaintiffs filed suit here. We  
20 didn't even know that Tristate was a SurgCenter affiliated --  
21 Cigna didn't know it was a SurgCenter affiliated center until  
22 after they filed that suit. The suit made Cigna realize that  
23 this was a SurgCenter affiliated suit. So there's not going to  
24 be the nationwide investigation -- all those documents that  
25 they're positing may be relevant, it's not going to be in the

1 Colorado litigation, and because June 2014 was the cutoff. But  
2 also because this was a unique situation where Cigna didn't  
3 realize that it was a SurgCenter -- and look, if there was an  
4 investigation that involved Tristate and other ASCs, we would  
5 have produced that document. We agreed to produce general  
6 policy documents of Cigna's, what it calls its fee forgiving  
7 policy and its protocol and to the extent those related to an  
8 investigation of Tristate, we've agreed to produce it.

9 I want to briefly go over the procedural defects and  
10 unless Your Honor has questions, I'll skip over the timeliness,  
11 but I do want to talk about why this is procedurally improper  
12 with regard to the Colorado action and how it relates to the  
13 protective order in the Maryland action because I think there's  
14 some confusion in the record or at least here today. So in the  
15 Colorado action, as I said before, there were actually two  
16 actions. The ASCs there, the Colorado ASCs had sued two  
17 hospital systems and a number of insurers, but not Cigna, and  
18 then a year later they sued Cigna.

19 And so the parties, because it was one alleged  
20 conspiracy, we agreed that in our case, we would enter a  
21 protective order where we would get access to any documents  
22 produced by parties in that case, so including all of the  
23 Colorado hospital systems and the insurers there. But we  
24 agreed to it on the condition that we wouldn't disclose it to  
25 parties outside of that case, outside of our case. We never

1 agreed to produce -- Cigna never agreed to produce third party  
2 documents in the Maryland action. We agreed to produce -- and  
3 I could point Your Honor to Exhibit B of plaintiffs' reply, and  
4 if you don't have a copy, I have one with me.

5 THE COURT: I've got the reply, I'm trying to find  
6 out if I've got the exhibits to the reply. While I have seen  
7 the exhibits to the reply, I don't have them up here. Why  
8 don't you just show me.

9 MR. HASKE: Sure. Paragraph 1 of the stipulation  
10 in Maryland which allowed for use of Colorado materials, states  
11 the Colorado parties agree that each Maryland party, those are  
12 parties to the Maryland action, shall have the right to use all  
13 materials produced by the Colorado parties. Colorado parties  
14 are defined as Cigna and the six ambulatory surgical centers in  
15 Colorado, not the two hospital systems, the number of other  
16 insurers in the other case. We never agreed to that. We  
17 couldn't agree to that because there's a protective order in  
18 that case that says we can't produce those documents.  
19 Obviously we could produce our own documents, so we agreed to  
20 do it because our thought was at the beginning outset of  
21 discovery, there are two Maryland ASCs in the Colorado action.

22 In the Maryland action it made sense to do it, it would  
23 avoid duplicative discovery. But we never agreed to produce  
24 the documents of third parties, which is what plaintiffs are  
25 asking for us to do here. It just didn't happen. And the



1 protective order in that case makes that clear. And it's  
2 paragraph 1 of the agreement which is Exhibit B to Cigna's  
3 opposition lays out that the parties to that related action in  
4 Colorado, what we call the HCA parties, which are the other two  
5 hospital systems and the other insurers allowed use in the  
6 Colorado action only and noted any disclosure beyond that was  
7 prohibited and that a breach would cause harm and damage. It's  
8 written into the agreement that way. So that is a procedural  
9 issue that we cannot, absent a modification of that order, give  
10 them the access that they're asking for. And it's what  
11 distinguishes the cases that they cite from the one here.

12 In those cases, the plaintiffs or the parties seeking  
13 discovery went to the Court that actually had the protective  
14 order. That's not what plaintiffs have done here. They've  
15 come to Your Honor who hasn't entered in that protective order.  
16 And there are other procedural mechanisms that they could have  
17 done if they truly wanted access as opposed to just opening up  
18 this discovery record here. They could have made an appearance  
19 in the Colorado action and tried to get documents as counsel  
20 for SurgCenter in Colorado. They could have moved that court  
21 to modify the order.

22 Or even here, they could have started off by saying, okay  
23 look, I hear their concern with deposition transcripts and  
24 motion for judgment pleadings, they could have asked us to  
25 provide just that limited subset of documents instead of the

1 190,000 pages of documents that we produced and the documents  
2 of all the third parties. All of those would have been a lot  
3 more palatable rather than what we think is an attempt to end  
4 run around the Colorado court's protective order. So unless  
5 Your Honor has any questions, I have nothing further.

6 THE COURT: I don't. I always give you, well, not  
7 you, but the movant the last word, and that happens to be what  
8 you are this time. You won't always get the last word, but you  
9 will on this motion.

10 MR. HALIJAN: Thank you. That is true in court and  
11 true in life, too, I guess. Let me address just a few things  
12 that Mr. Haskel said. First of all, as we said in the brief,  
13 we think this argument that Cigna is making about how  
14 discovery, how we've come to be here and agreements or  
15 disagreements as to the scope of discovery agreed to by prior  
16 counsel, again, I respectfully submit that's an attempt to  
17 change the subject. That doesn't have anything to do with  
18 whether we should have the right or not have the right to see  
19 these materials. We vigorously disagree with the  
20 characterization of what has happened since our firm took over  
21 as lead trial counsel, but I respectfully submit that's nothing  
22 more than diversionary anyway.

23 Second of all, this is not a discovery request in any  
24 kind of traditional sense. These materials are all in the  
25 possession of SurgCenter counsel in other cases already. We

1 didn't need to propound, and it never occurred to me, I will  
2 confess to the Court, it never occurred to me that we needed to  
3 propound a request for production to Cigna until Cigna took the  
4 position that we couldn't even have access, we couldn't even  
5 read any of this, even though it was already in the possession  
6 of former counsel for SurgCenter in this case. Cigna suggests  
7 that there's this sort of parade of horrors that might result  
8 from us being allowed simply to read this record to the extent  
9 we want to.

10 Not to be flippant about it, Your Honor, but how  
11 Ms. Glover and I spend our weekends between now and trial ought  
12 not to be Cigna's concern, we just want to have access to a  
13 record on the same footing that they do. We're not even asking  
14 for the right to use any of it and, again, how could I say what  
15 we want to use when we've been prohibited at least thus far  
16 from seeing any of it. The notion that there are sensitive  
17 Cigna documents that are in this discovery record in Colorado,  
18 again, I'm not sure how that gets to the result that Cigna  
19 wants since, again, those sensitive documents are already in  
20 the possession of SurgCenter counsel, just not SurgCenter's  
21 counsel in Arkansas.

22 Indeed some of them are already in the possession --  
23 unless they've been marked highly confidential, they're already  
24 in possession of my client. It's just my client can't allow me  
25 to see any of this. And beyond that, I'm not sure why it is

1 that Cigna ought to be allowed to say what I need to look at in  
2 order to prepare my case for trial, why it is their decision as  
3 to what I ought to be allowed to look at when there is this  
4 record in a very similar case already out there in Colorado.  
5 Again, it's equal footing. They haven't agreed to give us  
6 access to anything, even the testimony of Cigna's own  
7 witnesses, even deposition testimony of Cigna's own witnesses  
8 or the exhibits thereto.

9 THE COURT: Mr. Halijan, isn't it your client that  
10 agreed to this protective order in the beginning in Colorado  
11 that -- it wasn't up to Cigna, it was up to SurgCenter and  
12 Cigna to decide how to limit this thing. They asked for this,  
13 SurgCenter did, in the Colorado litigation. I'm assuming that  
14 there was an agreed protective order that likely was presented  
15 to the judge and the judge signed it, he didn't cram down this  
16 protective order without the request of the parties. And I'm  
17 assuming just based on the way things worked that that's the  
18 way it happened, but it was SurgCenter that agreed to the  
19 protective order in Colorado in the first place, was it not?

20 MR. HALIJAN: Yeah, absolutely, Your Honor. And the  
21 Court is correct, that this was an agreed upon protective  
22 order.

23 THE COURT: Then they agreed to get away from it a  
24 little bit in Maryland, both sides agreed at that point that  
25 they would alter their agreement to how all this information

1 between the two of them had been exchanged to be used in  
2 Maryland, correct?

3 MR. HALIJAN: That's likewise correct, but I think  
4 what wasn't foreseen, and Your Honor, all of us that are  
5 litigators know this, circumstances of cases sometimes change  
6 during the course of the case. I have certainly never in 23  
7 years, however long I've been doing this, I've never had a case  
8 like this where we've had an instance where there is this  
9 discovery record in a similar case out there where counsel for  
10 the client, my client can see it, but where I can't simply by  
11 virtue of the client making a decision to change lawyers in the  
12 middle of the case. Yes, is this an unforeseen consequence of  
13 that decision? It absolutely is.

14 But, again, I've read Mr. Haskel's brief, I've heard what  
15 he's just said. I don't see how there is any legitimate  
16 argument that Cigna is prejudiced certainly by my seeing  
17 Cigna's own document production, the testimony of its own  
18 witnesses and the deposition exhibits to the testimony of its  
19 own witnesses. I still haven't heard how there is any real  
20 prejudice associated by this in that the cat is already out of  
21 the bag, it's just a different group of SurgCenter lawyers have  
22 access to all of this.

23 Finally, yes, Your Honor, we could have approached this  
24 in a different way by filing motions to appear pro hac vice in  
25 Colorado and come under that protective order, and if there's

1 any fault, that fault is mine in our not doing that because we  
2 considered it, but we made the decision because of where the  
3 Colorado case was, nearing the end of factual discovery that  
4 that's not the right -- I just didn't feel like it was the  
5 right way to do it. It seemed too cute to simply make an  
6 appearance out there and thus come under that protective order  
7 in order to get access to documents that I believed fundamental  
8 fairness requires me to have access to anyway, so if there's  
9 any fault there, it's not SurgCenter's fault, it's not  
10 Tristate's fault, it's my decision.

11 THE COURT: Maybe I misunderstood Mr. Haskell's  
12 comments. I don't think he was suggesting you do that. I  
13 think he was suggesting that you go to the Colorado judge and  
14 ask for relief similar to what you're asking from me. Maybe I  
15 got it wrong, but I didn't -- I didn't hear him to suggest you  
16 try to pull that off.

17 MR. HALIJAN: Perhaps I got it wrong.

18 THE COURT: Maybe he did, I don't know. But it was  
19 not the way I processed it. It may have been the way he said  
20 it.

21 MR. HALIJAN: Either way. I may have misunderstood.  
22 Either way, making an appearance in Colorado, one question  
23 occurs to me is whether Mr. Haskell would have made some  
24 argument that I didn't have standing out in Colorado because I  
25 wasn't counsel of record. Either way, Your Honor, that seemed

1 like kind of a too cute by half way to get at this. We thought  
2 the most appropriate vehicle was to ask Cigna and then after  
3 they said no to everything, we had no choice but to approach  
4 the Court. Again, we think there are two avenues through which  
5 this can be addressed. One is a simple order of this court  
6 under Rule 37, or the protective order could be amended.

7 Unless the Court has any further questions of me, I will close.

8 THE COURT: I do not at this time. Thank you.

9 MR. HALIJAN: Thank you, Your Honor.

10 THE COURT: I'm going to deny Tristate and  
11 SurgCenter's request. I'll get an order out. It's not going  
12 to be particularly lengthy, but I will explain what I'm  
13 thinking in that order. I also am aware that I've got some  
14 motions to dismiss pending that I need to rule on that based on  
15 the alignment of the parties are difficult to say. I can just  
16 say that it's document numbers 112 and 123 rather than say the  
17 counter-counterclaim of the third-party plaintiff, defendant,  
18 etc. I think everybody understands what I'm struggling with on  
19 how to align the parties beyond just plaintiff and defendant at  
20 this time. I think both of y'all were traveling from Memphis  
21 and New York and accommodating if we made the request not to  
22 have it in Jonesboro. Either way, it was more convenient for  
23 me to be here than it was there. Is there anything else we  
24 need to do before we go off the record?

25 MR. HALIJAN: No, Your Honor.

1 MR. HASKEL: No, Your Honor.

2 THE COURT: All right. Court's in recess.

3 (Proceedings adjourned at 11:20 AM.)

4 C E R T I F I C A T E

5 I, Karen Baker, Official Court Reporter, do hereby certify  
6 that the foregoing is a true and correct transcript of  
7 proceedings in the above-entitled case.

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11 /s/ Karen Baker, RMR, CRR, CCR

Date: April 5, 2016

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United States Court Reporter

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Karen Baker, RMR, CRR, CCR  
United States Court Reporter